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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-755

GEORGE CREIGHTON,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Robert C. Cowan
1011 Northwest Loop 410,
Suite 101
San Antonio, Texas 78213
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

GEORGE CREIGHTON,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, GEORGE CREIGHTON, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on October 10, 1973.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court for the Northern District of Mississippi without opinion. A copy of the judgment and the affirmance appears as Appendix A attached hereto.

JURISDICTION

The order or judgment of the Court of

Appeals for the Fifth Circuit was entered on October 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the disjunctive allegations in the indictment give the defendant definite notice of the offense charged and thus enable him to defend himself and allow him to plead either an acquittal or a conviction as a bar to any subsequent prosecution?

2. Can a defendant be charged with and convicted of committing an offense that is a legal and physical impossibility?

3. Does a trial court have the power and authority to instruct a jury to convict a defendant for doing something other than that which is alleged in the indictment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Amendments to the Constitution of the United States applicable to this petition are as follows:

Amendment V:

> "No person shall be held to answer * * * unless on a presentment or indictment of a grand jury, * * * nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb; * * * nor

be deprived of life, liberty or property, without due process of law; * * *"

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *"

The statutes describing the offense under which this case was tried are as follows, to-wit:

18 U.S.C. 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. 1341 Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or

spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

18 U.S.C. 1341 (As Amended Pub. L. 91-375) Frauds and Swindles

Identical to prior quotation of 18 U.S.C. 1341 except that the phrase "Post Office Department" was deleted from the statute and the phrase "Postal Service" was substituted therefor.

Fed. Rules Cr. Proc. rule 7(c) 18 U.S.C. The Indictment and the Information

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a

formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Postal Reorganization Act, Public Law 91-375; 84 Stat. 719

Section 102. Definitions

As used in this title -

(1) 'Postal Service' means the United States Postal Service established by section 201 of this title;

Section 201. United States Postal Service

There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

STATEMENT OF THE CASE

The facts in the nature of this case are uncontroverted. This case involves an appeal from a conviction for a violation of the Mail Fraud Statute, 18 U.S.C. 1341, by the petitioner. Prior to trial a motion to dismiss the indictment was filed because of three disjunctive allegations in the indictment. The prosecution was held under 18 U.S.C. 1341 and under 18 U.S.C. 2 wherein your petitioner was alleged to have committed certain fraudulent acts and further as having done them as a principal under 18 U.S.C. 2. Each of the disjunctive allegations stated that either your petitioner had done certain things or had caused them to be done. The pertinent portions of the indictment are attached hereto in the Appendix. The trial court overruled the motion to dismiss the indictment.

The indictment in this cause alleges that the letter involved was to be sent and delivered by the Postal Service. At the time of the alleged offense the Postal Service did not exist, it having been created by Congress by the Postal Reorganization Act, Public Law 91-375 and the Postal Service under such law came into existence on July 1, 1971. Both the allegations and the proof showed that the offense occurred between November 7, 1969 and December 7, 1970. At the time of the alleged offense 18 U.S.C. 1341 prescribed a violation if the letter was to be sent by the Post Office Department. The indictment and statute therefore materially differ and the proof presented conforms to the statute, but not to the ~~proof~~ INDICTMENT.

The jurisdiction of the trial court in this cause was based upon an alleged violation of 18 U.S.C. 1341 and 18 U.S.C. 2.

REASONS FOR GRANTING THE WRIT

As to first question presented.

There was clearly raised the issue of the disjunctive allegations in the trial court prior to the trial of this cause. It is important to remember that your petitioner was indicted under 18 U.S.C. 1341 and 18 U.S.C. 2 and could be held criminally responsible for his own acts or the acts of his representatives for false and fradulent pretenses made personally as well as ones that he caused others to make, for inducing individuals to purchase franchises as well as for causing them to be induced and in personally making false and fraudulent pretenses as well as in causing false and fraudulent pretenses to be made by others.

In applying the pertinent parts of the two statutes involved it is plain to see that your petitioner could be convicted if either of the alternative allegations that were alleged could be proven. However, when the indictment alleged the alternatives in the disjunctive it does not give your petitioner adequate notice of which he will be called upon to defend. In addition, he does not now know of which he was convicted. Therefore, his right to be informed of the nature and the cause of the accusation against him under the Sixth Amendment to the Constitution has not been afforded him, nor is he in a position to prevent himself

from being subjected to twice being put in jeopardy of life or limb as guaranteed under the Fifth Amendment to the Constitution.

The action of the United States Court of Appeals for the Fifth Circuit in affirming the conviction without opinion is contrary to prior decisions of that same court, as well as other Courts of Appeals and of this court. It is impossible for your petitioner to take specific issue with the reasoning of the United States Court of Appeals for the Fifth Circuit since no opinion was rendered. Therefore, it is only possible to argue that the court was wrong in affirming the conviction and state the reasons in support thereof.

The rule that indictment may allege conjunctively different ways of commiting an offense, but not disjunctively has been recognized for many years in the United States Court of Appeals for the Fifth Circuit. Price v. U.S. 5th Cir. 1945; 150 F. 2d 283; Cert. Den. 66 S.Ct. 473, 326 U.S. 789, 90 L. Ed. 479; Reh. Den. 66 S. Ct. 519, 327 U.S. 813, 90 L. Ed. 1038. In Price v. U.S., the Fifth Circuit recognized the long standing rule when it stated as follows:

In United States v. Clarke, 20 Wall. 92, 87 U.S. 92; 104, 22 L. Ed. 320, the Supreme Court said:

"It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offenses,

would be destitute of the necessary certainty, and would be wholly insufficient. It would not give the accused definite notice of the offense charged and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses."

The same rule has consistently been recognized in the other Courts of Appeals. For example, see O'Neill v. U.S., 8th Cir. 1927, 19 F. 2d 322; Troutman v. U.S. 10th Cir., 1938, F. 2d 628; District of Columbia v. Hunt, D.C. APP., 1947, 163 F. 2d 833; Heflin v. U.S. 5th Cir. 1955, 223 F. 2d 371.

One of the best and most definitive statements on the specific question before this court can be found in United States v. Wells, Dist. Ct. Del. 1959, 180 F. Sup. 707.

It is submitted that the constitutional guarantees of your petitioner have not been fulfilled. It is respectfully submitted that the trial court was wrong in not granting the motion to dismiss the indictment and further that the Fifth Circuit was wrong in affirming the judgment of the trial court.

As to question number 2.

As has been stated, that at the time of the offense alleged and at the time shown by the proof that Postal Service did not exist, it having been created by Congress and, by resolution of the board of Governors, the effective date of the

amendment to 18 U.S.C. 1341 was July 1, 1971. This was the date that there became established an independent establishment of the executive branch of the Government of the United States, the United States Postal Service. This is also the date that the Post Office Department no longer existed. It was legally and physically impossible for your petitioner to have had a letter that was to be sent and delivered by the Postal Service, as alleged in the indictment, during the time alleged and proven. There simply did not exist a Postal Service.

It should not be significant that the name is similar to the former name of the governmental agency that carried the United States mail. It is in truth and in fact a complete and different separate governmental entity. Insofar as this case is concerned, it would have been no difference if the indictment had alleged that the letter was to be sent by the Department of the Defense, the Department of State, or any other governmental agency. In fact, the Government alleged something that was not possible for them to prove. They did not prove it. It was stipulated during the trial that the effective date of the Postal Reorganization Act was July 1, 1971.

It is an inescapable conclusion that either the indictment did not allege an offense against the laws of the United States or, alternatively, the proof did not meet the allegations. In either case, your defendant should have been acquitted of the charges alleged. This was not done by the trial court nor was

the error corrected by the Fifth Circuit. This obvious injustice should be corrected by this court.

As to question number 3.

Question number 3 also relates to the fact that the indictment alleges Postal Service as opposed to Post Office Department. As has been stated, the stipulated proof was that the effective date of the Postal Reorganization Act was July 1, 1971. Therefore, prior to that date, it did not exist. There did exist the Post Office Department.

The trial judge, in its charge to the jury, advised the jury that before they could convict your petitioner that they must find that the mail matter was to be sent by the Post Office Department. This instruction by the court to the jury was contrary to the allegations of the indictment. Your petitioner was not charged with sending a letter by the use of the Post Office Department, but rather was charged with sending a letter by the use of the Postal Service, again, the completely separate and independent agency of the United States Government.

The actions of the trial judge in its charge, did, in fact, instruct the jury that they could convict the petitioner for doing something other than that which was alleged in the indictment.

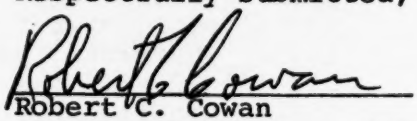
It is herewith submitted, that this charge of the court was erroneous, and that your petitioner should have been only convicted upon that which was clearly alleged in the indictment as required

by Fifth and Sixth Amendments to the Constitution.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



Robert C. Cowan
1011 Northwest Loop 410
Suite 101
San Antonio, Texas 78213
Counsel for Petitioner

Royal D. Adams
1011 Northwest Loop 410
Suite 101
San Antonio, Texas 78213

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

UNITED STATES OF AMERICA

V.

CRIMINAL NO. CRE7283
(18 USC 2 and 1341)

GEORGE CREIGHTON
KEN SCHULTZ

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. That commencing on or about September 1, 1968, and continuing to on or about February 15, 1971, in the Northern District of Mississippi and elsewhere, George Creighton, Ken Schultz, Lease-A-Car of Monroe, Inc., and Lease-A-Car, Inc., and diverse other persons unknown to the Grant Jury, aided and abetted by each other, devised and intended to devise a scheme and artifice to defraud and obtain money by false and fraudulent pretenses, representations and promises from persons in various parts of the United States who were desirous of investing in a business opportunity and who were willing to purchase a franchise as an investment, well knowing at the time that the pretenses, representations and promises would be and were false when made; which scheme and artifice to defraud, devised and intended to be devised, by said defendants, was in substance as follows:

2. It was a part of said scheme and artifice to defraud that the defendants herein did prepare and use, and cause to be prepared and used, sales materials, including brochures, letters, reports and other literature, containing false and misleading representations and statements, to be placed in the mails at the post office in Aberdeen, Mississippi, and sent by mail throughout the United States in order to induce the persons to be defrauded to contact the defendants or their representatives and made or caused to be made false and fraudulent pretenses, representations and promises in substance as follows:

(a) As a Lease-A-Car of Monroe, Inc. Dealer the dealer's average yearly earnings should exceed $40,000.00.

(b) All credit checks, billing, collecting vehicle purchases, etc. would be performed by Lease-A-Car of Monroe, Inc. in addition to all financing.

(c) Lease-A-Car of Monroe, Inc. would appoint one territorial dealer in the dealer's area for one of the fastest growing businesses in the country--automobile leasing.

3. That in furtherance of said scheme and artifice to defraud, the defendants would and did induce, or cause to be induced, persons to purchase Lease-A-Car of Monroe, Inc. dealership franchises.

4. That in furtherance of said scheme and artifice to defraud, the defendants would and did, or caused to be done, in

the offer of sale of Lease-A-Car of Monroe, Inc. and United States Fidelity Leasing Corporation dealership franchises and in order to obtain money from the purchasers thereof, make and cause to be made diverse false and fraudulent pretenses, representations and promises, well knowing at the time that the said pretenses, representations and promises would be and were false when made, including the following:

(a) That the franchise purchaser or dealer would be furnished with a number of sub-dealers in the assigned territory to assist the franchise purchaser in securing prospective customers to lease cars.

(b) That the rates the franchise purchaser as dealer would charge for leased automobiles would be cheaper than local dealer and competition.

(c) That the purchaser of the franchise would receive training and instruction on calculating rates.

(d) That a portion of the dealer's contract was an agreement that Lease-A-Car of Monroe, Inc. would re-sell the dealer's license and refund said license fee.

(e) That the defendants offered exclusive franchises to a certain area.

5. The Grand Jury charges that in furtherance of said scheme and artifice to defraud, GEORGE CREIGHTON, a defendant aided and abetted by diverse persons

unknown to the Grand Jury, in the Northern District of Mississippi and elsewhere, on or about October 30, 1970, caused to be placed in an authorized depository for mail matter, to be sent and delivered by the Postal Service, a letter addressed to Lease-A-Car of Monroe, Inc., P. O. Box 176, Aberdeen, Mississippi, containing a check for $5,000.00; in violation of Section 1341 and Section 2, Title 18, United States Code.

(nm $1,000.00 or nm 5 yrs., or both)

(Counts Two through Twenty re-alleges Paragraphs 1, 2, 3 and 4 and in Paragraph 5 refers to a letter mailed on different dates by the Postal Service.)

A TRUE BILL

_____

FOREMAN

U.S. COURT OF APPEALS
FILED
Nov 5 '73
EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NO. 73-2608

GEORGE CREIGHTON,

Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including November 9, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within

the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Lewis R. Morgan

UNITED STATES CIRCUIT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-2608
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGE CREIGHTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

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(October 10, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2608
Summary Calendar

D. C. Docket No. CR 72-83-K

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE CREIGHTON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 10, 1973

Issued as Mandate:

SUPREME COURT, U. S.

FILED

FEB 12 1974

No. 73-755

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE CREIGHTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-755

GEORGE CREIGHTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that language in the indictment that the defendants "did, or caused to be done" certain acts charged in connection with the allegations of fraud kept the indictment from providing adequate notice of the crime charged. Petitioner also contends that the indictment was fatally defective in that it charged him with illegally using the United States Postal Service, although the postal reorgani-

zation which created that agency had not been completed at the time of the alleged crime.

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on eighteen counts charging aiding and abetting mail fraud, in violation of 18 U.S.C. 1341 and 2. He was sentenced to a term of six years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 18).

From September 1968 until February 15, 1971, petitioner, Ken Schultz and others were involved in a fraudulent scheme to sell car leasing franchises. In furtherance of the scheme, petitioner and his business associates organized Lease-A-Car, Inc., which purported to be a management corporation, and Lease-A-Car of Monroe, Inc. which sold franchises (Tr. 83-84, 852-858, 1034-1040).[1] Petitioner sent by mail materials containing false and misleading representations to induce members of the public to purchase the franchises. These materials fraudulently promised, *inter alia*, that one's average yearly earnings as a Lease-A-Car of Monroe, Inc. dealer should exceed $40,000; and that Lease-A-Car of Monroe, Inc. would perform numerous services for the franchise holders (Tr. 78).[2]

1. Petitioner argues that alternative allegations

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[1] "Tr." refers to the transcript of the trial proceedings.

[2] The allegations of fraud are set out in considerable detail in the indictment. See Pet. 13-16.

of the indictment, set forth in the disjunctive, did not properly inform him of the nature of the offense charged.[3]

However, criminal charges drawn under 18 U.S.C. 1341 setting forth allegations in the disjunctive have been consistently upheld as providing adequate notice of the offense alleged. See *Simons* v. *United States*, 119 F.2d 539, 547-548 (C.A. 9), certiorari denied, 314 U.S. 616; *Worthington* v. *United States*, 64 F.2d 936, 938 (C.A. 7); *United States* v. *Cafarelli*, 183 F. Supp. 734 (D. Utah). In an analogous situation in *Johnson* v. *United States*, 207 F.2d 314, 319-320 (C.A. 5), certiorari denied, 347 U.S. 938, the Court of Appeals for the Fifth Circuit, rejecting a claim that the defense had been "embarrassed by the use of the disjunctive," stated:

> There can be no valid contention that appellant's defense was embarrassed or that he was surprised by the evidence offered against him at the trial merely because the indictment alleged the prohibit[ed] character of the goods in the disjunctive rather than in the conjunctive. The indictment did not charge appellant in the alternative with having committed one or another of several offenses. He was charged with only one offense.

2. Petitioner also contends that the indictment was fatally defective because it charged that he used the United States Postal Service instead of the Post

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[3] These challenged allegations are set forth at Pet. App. 14-15.

Office Department, when the Service had not as yet been established by law. For there to be a prejudicial variance, however, the defendant "must establish not only that a variance between indictment and proof occurred, but that the variance 'affected the substantial rights of the parties.'" *United States* v. *Morado*, 454 F.2d 167, 170 (C.A. 5), certiorari denied, 406 U.S. 917. Here, there is no evidence that petitioner was misled by the alleged variance.

In *Hagner* v. *United States*, 285 U.S. 427, 433, where the indictment in a mail fraud prosecution failed to show jurisdiction in the trial court because it did not specifically allege that the defendants caused the letter "to be delivered by mail according to the direction thereon," this Court upheld the indictment:

> Omission from an indictment, drawn under the section of the Criminal Code now under consideration, of a specific allegation that the letter was "to be sent or delivered by the post office establishment" was not considered prejudicial where the indictment sufficiently alleged that the letter was placed in the post office properly addressed.[4]

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[4] In a related argument, petitioner contends that since the indictment charged the use of the Postal Service rather than

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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the Post Office Department, the trial judge's instruction to the jury that a conviction must rest on a prior finding that the Post Office Department's services were used was constitutionally impermissible. Not only did petitioner fail to object to the trial court's instruction at trial, but defense counsel complimented the court for having given "a superb instruction" (Excerpts of Proceedings, p. 112).

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